



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU**

**CAUSE NO. 438 OF 2013**

**MICHAEL MUDOGO**

**CLAIMANT**

**v**

**KERIO VALLEY DEVELOPMENT AUTHORITY**

**RESPONDENT**

**JUDGMENT**

1. In a Memorandum of Claim filed in Court on 16 December 2013, Michael Mudogo (Claimant) alleged that Kerio Valley Development Authority (Respondent) unlawfully terminated his employment. He sought a declaration to that effect, reinstatement and general damages.
2. The Respondent filed a Reply on 24 June 2014, which prompted the Claimant to file a Rejoinder on 23 July 2014. The parties also filed supporting documents.
3. The Cause was heard on 26 February 2015 and 28 May 2015 and the Claimant filed his submissions on 16 July 2015. The Respondent had filed initial submissions together with the Response and another set on 28 October 2015.
4. The Court has considered the pleadings, evidence and submissions and identified the issues for determination as, *whether the dismissal of the Claimant was unfair and appropriate remedies.*

**Whether dismissal was unfair**

***Procedural fairness***

5. The Claimant, a Plant Mechanic was suspended through a letter dated 23 August 2013. The letter outlined the charge against the Claimant as dishonesty or misconduct prejudicial to the Authority and the particulars of the allegations included repairing and operating a motor grader without involving the Plant Operator, parking the motor grader at a chief's camp without informing anybody, retaining the grader's keys and removing the grader from the camp without informing the Chief.
6. The letter requested the Claimant to tender explanations within 7 days why he could not be dismissed.
7. The Claimant responded to the suspension letter through a letter dated 30 August 2013, and he indicated that the suspension letter had been served upon him only the previous day.
8. In the meantime (on 26 August 2013), the Respondent summoned the Claimant to appear before its Staff Disciplinary Committee and informed him that he could be accompanied by a colleague or union official during the hearing.
9. The minutes produced of the hearing show that a Union official was present and that the Claimant was given an opportunity to defend himself.
10. The process as narrated should be juxtaposed with the requirements of section 41 of the Employment Act, 2007 to evaluate whether it meets the statutory requirements.
11. The Claimant was informed of the charges to confront in the suspension letter. He was served

- with the letter and he made written representations. He was also given an opportunity to make oral representations. He made the representations and the minutes show that a union official was present.
12. The Claimant challenged the process on the grounds that he was not given ample time, that the chairman of the Staff Disciplinary Committee should have been a witness and that the Plant Operator William Kiptoo testified on 2 September 2013, in his absence.
  13. The Claimant did not raise the issue of time before the Committee. He did not raise any objections against the chairman of the Committee at the first instance before the Committee. These grounds therefore cannot vitiate the process.
  14. It is desirable that an employee facing a disciplinary process should raise these type of objections at the earliest opportunity before the disciplinary hearing commences and moreover where an employee has representation by a union official who ought to know about industrial relations.
  15. The other ground the Claimant raised was that a William Kiptoo who was the Plant Operator appeared and was questioned by the Committee in his absence. This assertion is confirmed by the minutes which show that the Plant Operator testified on 2 September 2013.
  16. The minutes indicate that the Plant Operator gave incriminating testimony against the Claimant.
  17. In this regard, the Claimant should have been allowed to challenge and or question the Plant Operator.
  18. Although this Court has previously held that an employer is not expected to hold a mini-court in the name of disciplinary proceedings, in the instant case, the Claimant was prejudiced. He was occasioned an injustice.
  19. Where an employer decides to call witnesses during a disciplinary hearing, it is imperative the witness tell their story in the presence of the employee facing disciplinary action.
  20. And on this ground, the Court finds that the process conducted by the Respondent failed to meet the test of procedural fairness. It was equally not in accord with equity and justice.
  21. With the finding that the process did not pass statutory test, it is not necessary to discuss whether the Respondent had and has proved the reasons for dismissal as valid and fair as required by sections 43 and 45 of the Employment Act, 2007.

### **Appropriate remedies**

#### ***Reinstatement***

22. Reinstatement is one of the main remedies where the Court concludes there has been unfair termination of employment. But the statute has outlined certain caveats to be considered before ordering reinstatement.
23. In the view of the Court, this is not a fit case to order reinstatement and in lieu thereof, compensation would be adequate and fair.

#### ***Compensation***

24. The Claimant served the Respondent for nearly 22 years. Considering the length of service, the Court would award the equivalent of 12 months gross wages as compensation.
25. The Claimant however did not prove his gross wages at time of dismissal, but his pay slip for July 2013 produced by the Respondent show his gross wages as Kshs 27,772/-.
26. The Court would assess the compensation as Kshs 333,264/-.

#### ***Other relief***

27. With the findings made, the Court would direct the Respondent to pay the Claimant any terminal benefits he would have been statutorily/contractually entitled to had he retired normally.

### **Conclusion and Orders.**

28. The Court finds and holds that the dismissal of the Claimant was procedurally unfair and did not accord with justice and equity and awards him and orders the Respondent to pay him

- a. 12 months gross wages compensation Kshs 333,264/-.
- b. Terminal benefits as would have accrued on normal retirement.

29. Claimant to have costs.

**Delivered, dated and signed in Nakuru on this 6<sup>th</sup> day of November 2015.**

**Radido Stephen**

**Judge**

**Appearances**

For Claimant Mr. Musembi instructed by Wambua Musembi & Co. Advocates

For Respondent Mr. Ambenge, Executive Officer, Federation of Kenya Employers

Court Assistant Nixon